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Before the
Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

Washington, D.C. 20554

.....
 In re Applications of)

GAF BROADCASTING COMPANY, INC.,)

For Renewal of License of Station)
 WNCN (FM), New York, New York)

CLASS ENTERTAINMENT AND)
 COMMUNICATIONS, L.P.)

THE FIDELIO GROUP, INC.,)

For a Construction Permit for a New FM Station)
 on 104.3 MHz at New York, New York)
)

MM Docket No. 93-54

File No.
 BRH-910201WL

File No.
 BPH-910430ME

File No.
 BPH-910502MQ

To: The Honorable Joseph Chachkin
 Administrative Law Judge

**CONSOLIDATED REPLY TO OPPOSITIONS TO
 MOTION TO ENLARGE ISSUES**

LISTENERS' GUILD, INC. (hereinafter "Guild"), by its attorney, hereby respectfully replies, pursuant to 47 C.F.R. § 1.294 (c)(1),¹ to the *Opposition* filed by GAF Broadcasting Company, Inc. ("GAF") and by the Mass Media Bureau ("Bureau") to the Guild's *Motion to Enlarge Issues* in the above-captioned

1. By Order, FCC 93M-245, released May 11, 1993, the Guild's time for filing this Consolidated Reply was extended to May 17, 1993.

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hearing proceeding designated by the *Hearing Designation Order*, 8 FCC Rcd 1742 (1993) ("*HDO*").

As a threshold matter, GAF's argument that the Guild is not entitled to make the instant motion is baseless. Indeed, the Commission's Rules expressly contemplate that a party petitioning for intervention may seek to add issues. 47 C.F.R. 1.223(b) (1992).

GAF also argues in its *Opposition*, at 4-5, that the Presiding Officer lacks authority to grant the Guild's *Motion*. However, its argument strains beyond recognition the holding of *Atlantic Broadcasting Co.*, 5 FCC 2d 717 (1966), on which GAF relies. *Atlantic* was careful in limiting the preclusive effect of a hearing designation order so as not to impair the ability of a Presiding Officer to grant enlargement of issues with respect to matters not subjected to "thorough consideration" or affected by "new facts or circumstances." The instant case falls well within those areas.

As already discussed in the Guild's *Motion to Enlarge Issues*, *Petition for Intervention* and *Petition for Reconsideration*, neither of the issues proposed by the Guild were dealt with in the *Hearing Designation Order*, and each is based in whole or in part upon facts and circumstances which have occurred since the Guild's last filing during the pleading cycle initiated by its *Petition to Deny*

GAF's False EEO Reporting and Pleading

The first issue proposed by the Guild is based on a disclosure made by GAF just one week before the adoption of the *HDO* — and not recited therein as being before the Commission when the *HDO* was adopted. The Presiding

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Officer thus has ample authority under *Atlantic* to add an issue or issues to address the highly significant and serious questions raised by GAF's false reporting and pleading to the Commission. Nothing alleged by GAF or the Bureau indicates that the Commission's decision to separate EEO matters from the comparative hearing was made after *any* consideration — much less "thorough consideration" — of those "new facts [and] circumstances."

The Bureau suggests that the Guild's allegations are insufficient in the absence of facts "indicating that there was any pattern of inaccurate reporting or motive to deceive." Bureau *Opposition*, at 3. GAF also tries to minimize the impact of this matter by interweaving into its *Opposition*, at 5-7, what are in essence unsworn allegations of fact, contrary to the requirements of 47 C.F.R. § 1.229(d) (1992). For example, GAF's counsel describes the false reports and pleading with such terms as "erroneous," "misclassification," "error" and "mistake." Such characterizations of the facts clearly require affidavit support, — as the Guild has previously pointed out, yet as GAF continues to disregard

Neither GAF's *Opposition* nor its other pleadings offer any *explanation* of the circumstances under which the false reports were originally made or later revised. GAF merely states that the current General Manager (and another GAF employee) concluded that a particular GAF employee should be included in a different reporting category than as previously reported to the Commission and as discussed in prior pleadings herein. GAF *Opposition to Petition for Reconsideration*, April 29, 1993, at 4-5; GAF *Amendment to Consolidated Opposition*, Feb. 22, 1993, at 2. It is particularly significant that no

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affidavit has been offered by GAF to confirm how the information came to be falsely reported in the first place, and when its falsity was discovered.

As the questions raised in the Guild's *Petition for Reconsideration* concerning GAF's false EEO report and pleading relate to matters peculiarly within GAF's knowledge, GAF should not be permitted to withhold the relevant information from the Commission without raising an inference that the information so withheld is adverse to it. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221-22 (1939). This is especially so where, as here, there are numerous factors suggesting why GAF might have been motivated to exaggerate its EEO performance and indicating the unlikelihood that this was merely an oversight on GAF's part.

Atlantic Broadcasting. While it is true that the Guild may seek (and has sought) reconsideration of the HDO, *Atlantic* specifically permits a motion such as the instant one to be addressed to the Presiding Officer with respect to issues that are not thoroughly considered in the HDO. It clearly is not enough that the HDO says it has considered an issue when it is plain from reading the HDO that it has not done so.

GAF's characterization (by reference to its *Opposition to Petition for Reconsideration*) of the Guild's allegations of GAF's abuse of the Commission's processes as resting on the contention that "GAF's use of the name 'WNCN Listeners' Club' for the station's promotional organization is confusingly similar to the Guild's own name" does not accurately describe the essence of the Guild's claims. Indeed, GAF actively continues its efforts to obfuscate the issue by describing the Guild's claim as being "that the HDO gave short shrift to its allegations concerning GAF's use of the name 'WNCN Listeners' Club'" *Opposition to Petition for Reconsideration*, at 6. Anyone who has read any of the Guild's pleadings herein — including its *Petition for Reconsideration* — could not possibly recognize that as a fair statement of the Guild's claim.

The Guild has not asked the Commission to "adjudicate intangible property rights." Rather, it asks the Commission to determine whether the tactics employed by GAF in order to advance its own private interests in this and other proceedings pending before the Commission are compatible with its duties as a licensee to be forthcoming and candid with the Commission and not to scheme to prevent relevant adverse information from reaching the Commission's eyes and ears. That question, which is clearly one which

the Commission, and the Commission alone, can answer, is entirely distinct from questions concerning the presence or absence of confusion between two names, and is nowhere discussed in the *HDO*. What matters in this proceeding is not whether GAF should have chosen the name it did, but whether it was appropriate to dangle the promise of changing that name as bait to avoid having information and arguments adverse to it reach the Commission.

Similarly, the Commission need not adjudicate the enforceability of the confidentiality agreement between GAF and the Guild — except insofar as it may violate *Commission* policy for a licensee to insist upon enforcement of such an agreement in order to prevent material information from reaching the Commission in derogation of its duty of candor. It is hard to see how that issue could possibly be for any tribunal but the Commission to decide.

Although the Guild's allegations have been somewhat "cryptic," GAF *Opposition* at 7, that is principally the result of GAF's refusal to permit full disclosure to the Commission of the non-privileged material on which the Guild's claims are based in part. It is not correct, however, to call the Guild's allegations "unsupported." *Id.* In fact, the substantive allegations of the Guild's pleadings *are* supported by affidavit or affirmation. That is more than can be said for virtually any of GAF's pleadings in this and prior proceedings before the Commission.

CONCLUSION

In light of the foregoing, the hearing issues should be enlarged to encompass both of the Guild's proposed issues, and the Guild should be permitted to participate fully as a party in interest with respect to all subsequent proceedings thereon.

Dated May 17 1993

Before the
Federal Communications Commission
 Washington, D.C. 20554

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on 104.3 MHz at New York, New York)	
)	

To: The Honorable Joseph Chachkin
 Administrative Law Judge

STATE OF NEW YORK)
 COUNTY OF QUEENS) Ss:

DAVID M. RICE, an attorney admitted to the bar of the State of New York,
 hereby affirms, under penalty of perjury, as follows:

I am the attorney for Listeners' Guild, Inc., the movant herein. In that capacity I have participated in the preparation of the annexed *Consolidated Reply to Oppositions to Motion to Enlarge Issues*, as well as in events referenced in said pleading. To the best of my knowledge, information and belief, the allegations of the *Consolidated Reply* are true and correct.

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I declare and affirm under penalty of perjury that the foregoing is true and correct.

Executed on May 17, 1993.

A handwritten signature in cursive script, appearing to read "David M. Rice", is written over a horizontal line.

David M. Rice

CERTIFICATE OF SERVICE

I, **DAVID M. RICE**, hereby certify that the foregoing "CONSOLIDATED REPLY TO OPPOSITIONS TO MOTION TO ENLARGE ISSUES" was served this 17th day of May, 1993, by mailing a true copy thereof by United States first class mail, postage prepaid, to each of the following:

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A handwritten signature in cursive script, reading "David M. Rice". The signature is written in dark ink and is positioned above a horizontal line.

David M. Rice